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No. 92-710

In The

Supreme Court of the United States

October Term, 1991

JETTY LEE HARVEY,
Petitioner,

vs.

THE STATE OF WYOMING,
Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
FOR THE STATE OF WYOMING

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE ISSUE OF ADMISSION OF THE PETITIONER'S SENTENCING STATEMENT IN A SUBSEQUENT PROSECUTION WAS DECIDED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

II. WHETHER ADOPTION OF THE EXCLUSIONARY RULE URGED BY THE PETITIONER IS NECESSARY WHEN EXISTING LAW GOVERNING THE USE OF VOLUNTARY JUDICIAL ADMISSIONS ADEQUATELY PROTECTS CONSTITUTIONAL RIGHTS.

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OPINIONS BELOW

The opinion of the Wyoming Supreme Court was entered on June 11, 1992, and reported in *Harvey v. State,* 835 P.2d 1074 (Wyo. 1992). This opinion will be referred to as *Harvey II,* because the Petitioner had earlier been tried and convicted on different charges related to the same criminal episode. The Petitioner appealed those earlier convictions and succeeded in reversing them. *Harvey v. State,* 774 P.2d 87 (Wyo. 1989). That opinion will be referred to as *Harvey I.*

STATEMENT OF THE CASE

Jetty Lee Harvey and Everett Phillips discussed abducting a woman they saw on the street as they drove in Rock Springs, Wyoming, during the night of January 5, 1986. *Harvey v. State*, 835 P.2d 1074, 1076 (Wyo. 1992) (Harvey II). After the victim ignored Mr. Harvey's invitation to ride with them, Harvey got out of Phillips' truck and grabbed her as she tried to run past him. *Id.* Mr. Harvey put her into the truck and she was pulled into the back seat where David Swazo sexually assaulted her, after Harvey and Phillips helped him take off her clothes. *Id.*

Thanks to a witness who had seen the abduction, police stopped the truck and rescued the woman. *Harvey v. State*, 774 P.2d 87, 90 (Wyo. 1989) (Harvey I). Mr. Harvey was charged with kidnapping and first degree sexual assault, and aiding and abetting those crimes, and found guilty after a jury trial in July, 1987. *Harvey I*, 774 P.2d at 90-91. In October of 1987, Mr. Harvey appeared for sentencing and he made an allocution statement to the court. *Harvey II*, 835 P.2d at 1080. He was sentenced to concurrent prison terms of 20 to 30 years on each count. *Harvey I*, 774 P.2d at 91.

The Wyoming Supreme Court reversed Mr. Harvey's convictions in May of 1989 because of a speedy trial violation. *Harvey I*, 774 P.2d at 89. In July of 1989, he was charged with conspiracy to commit kidnapping and conspiracy to commit sexual assault based on the events of January 5, 1986. *Harvey II*, 835 P.2d at 1076. After a jury trial in January of 1990, Mr. Harvey was found guilty of the kidnapping conspiracy charge and not guilty of the sexual assault conspiracy charge. *Id.* at 1077. He was

sentenced on May 15, 1990, to a prison term of 12 to 15 years. *Id.*

At the trial on the conspiracy charges, portions of Mr. Harvey's allocution statement were read into evidence during the State's case in chief. *Harvey II*, 835 P.2d at 1080-1081. (Record on Appeal [R.A.] Vol. III, pp. 1168-1173). Prior to the admission of the statement, the trial court held a hearing on its admissibility. (R.A. Vol. IV, pp. 936-995). The trial court noted that Mr. Harvey had been advised of his rights under the fifth amendment to the United States Constitution upon his arrest by police, at his initial appearance in county court, and at his arraignment in district court. (R.A. Vol. IV, pp. 992-993). The court also noted that during his first trial Mr. Harvey had made decisions about whether to testify. (R.A. Vol. IV, p. 993). He did not testify. The court further noted that Mr. Harvey had been represented by counsel at all critical stages of the prior criminal proceeding. (R.A. Vol. IV, p. 993).

The trial court found that Mr. Harvey had not attempted to reserve his fifth amendment rights at the time of his allocution, that his statement was not compelled, and that his statement was voluntary. (R.A. Vol. IV, p. 993). On appeal, the Wyoming Supreme Court concluded that Mr. Harvey had "waived his right to remain silent and made a voluntary statement which is admissible . . . ." *Harvey II*, 835 P.2d at 1084. The court also rejected other issues raised by Mr. Harvey and on June 11, 1992, affirmed his conspiracy conviction.

REASONS FOR NOT GRANTING THE WRIT

I. THE ISSUE OF ADMISSION OF THE PETITIONER'S SENTENCING STATEMENT IN A SUBSEQUENT PROSECUTION WAS DECIDED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

In his appeal to the Wyoming Supreme Court, Mr. Harvey argued that the use of his sentencing statement violated his rights under both the United States Constitution and article 1, section 11, of the Wyoming Constitution. *Harvey II*, 835 P.2d at 1076, 1081-1082. In reviewing this claim, the state court noted that Wyoming had previously recognized the right to allocution as "constitutionally protected." *Id.* at 1082; *Christy v. State*, 731 P.2d 1204, 1207 (Wyo. 1987). The court also reviewed the state history of a defendant's right to allocution, beginning with a territorial decision in 1873 and continuing up to current practice under Rule 33(a)(1) of the Wyoming Rules of Criminal Procedure. In analogizing a defendant's right of allocution with the right to testify in one's own behalf, the Wyoming Supreme Court referred to both federal and state constitutional provisions which guaranteed the right to testify, and expressly noted such right in article 1, section 10, of the Wyoming Constitution. *Harvey II, supra* at 1082.

The Wyoming Supreme Court acknowledged that an accused can waive his right to remain silent and testify if he wishes. *Harvey II*, 835 P.2d at 1082. Only when "genuine compulsion" produces incriminating testimony do concerns about violation of the self-incrimination privilege come into play. *Id.* The state constitutional provisions

in this area provide more rights to Wyoming citizens than do similar provisions in the United States Constitution. *Black v. State*, 820 P.2d 969, 972 (Wyo. 1991). The court found that the Petitioner's allocution statement was voluntary, and held that it had been properly admitted at the second trial. *Harvey II*, 835 P.2d at 1083-1084. Even the dissenting opinion on which the Petitioner relies so heavily noted that the federal precedents dealing with allocution had not provided the clearest guidance. *Harvey II*, 835 P.2d at 1987 and 1091.

The repeated references to the Wyoming Constitution, together with the perception expressed by the court that federal allocution precedent was ambiguous, make it clear that the case was decided on adequate and independent state grounds. Given the ruling in *Black*, 820 P.2d at 972, that the admissions of an accused are more strictly scrutinized under the state constitution than under the fifth amendment of the United States Constitution, the Wyoming Supreme Court's detailed analysis of relevant issues under the Wyoming Constitution has immunized its decision from subsequent review by this Court. *Payton v. New York*, 445 U.S. 573, 600 (1980). The Wyoming Supreme Court's reliance on article 1, sections 10 and 11 of the Wyoming Constitution created adequate and independent state grounds for its judgment. These grounds preclude review by this Court. *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945); *also, see generally*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Accordingly, the petition for writ of certiorari should be denied.

II. ADOPTION OF THE EXCLUSIONARY RULE URGED BY THE PETITIONER IS NOT NECESSARY BECAUSE EXISTING LAW GOVERNING THE USE OF VOLUNTARY JUDICIAL ADMISSIONS ADEQUATELY PROTECTS CONSTITUTIONAL RIGHTS.

The Petitioner has asked this Court to decide if a defendant's right to speak before sentencing is constitutionally protected under the due process clause. The State suggests that such question is irrelevant, because he did speak to the court before sentencing. As presented, this question is too broad to have any national significance. Furthermore, the Petitioner failed to present and argue this same question below, and it was not properly preserved for review. *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-816 (1985).

The Petitioner has also argued that the use of his sentencing statement in a subsequent prosecution violates his rights to silence and to due process. This Court should not address that question, however, since it was appropriately decided below. Essentially, the Petitioner wants this Court to create a new constitutional exclusionary rule which would prevent the use of sentencing statements in later prosecutions. But it is not necessary to increase the complexity of the criminal justice system by adopting such a rule, because existing rules governing the use of judicial admissions are clear, workable and constitutional. Such rules were appropriately applied below, and fully protected the Petitioner's rights.

The Petitioner chose to put the government to its burden of proof during his first trial by denying the factual

elements of guilt. Only after he was convicted did he confess his guilt at sentencing in an admitted effort to curry favor with the court. The Petitioner's self-incriminating statement admitted the crimes of which he was convicted, and more. He made the statement under oath in open court, with his lawyer at his side, and upon his lawyer's advice. *Harvey II*, 835 P.2d at 1083. (R.A. Vol. IV., pp. 976-981). He has admitted that his statement was voluntary. (R.A. Vol. IV, p. 980, lines 14-18).

The Petitioner's voluntary admission was neither solicited nor required by the State. Nor was it made pursuant to an agreement to cooperate with the State. No agreement of any kind to restrict the future use of information disclosed by the Petitioner was made or even discussed. His sentencing was not conducted as an investigatory proceeding. He was not questioned by the court, the prosecutor or his attorney regarding the statement he made. By his free choice, the Petitioner simply tried to further his own best interests.

Yet, to build the paradigm necessary for his analysis to succeed, he first claims that his decision to speak was "coerced" because he was faced with a choice between two fundamental, but antagonistic, rights, i.e., speaking at allocution or remaining silent. From that point, he argues that such coercion should prevent the future use of his statement. The Petitioner asserts that his decision to speak deprived him of his right to remain silent and that no defendant should have to face choosing between such inherently conflicting options. (Petition for Writ of Certiorari, pp. 12-13). But there is nothing improper or unconstitutional in holding a defendant responsible for the natural consequences of a freely chosen course of conduct.

The Petitioner complains about something which is inherent in our system of justice. The imposition of choices is an inevitable and permissible attribute of any system founded on personal freedom. *McGautha v. California*, 402 U.S. 183, 213 (1971); *Brady v. United States*, 397 U.S. 742, 751-752 (1970). If the change sought by him is granted, then no principled reason would exist to have a defendant make choices at any stage of a criminal proceeding. If a defendant chooses to testify at trial, he necessarily loses his right to remain silent. Under the Petitioner's analysis, if that choice produces an undesired consequence such as disbelief by the jury and resulting conviction, then he ought to be relieved from such consequence. Under this theory, perhaps juries would be instructed to disregard a defendant's trial testimony unless they found that it helped his cause. Certainly, such absurd and unworkable procedures are not constitutionally mandated.

Our system of justice has determined that allowing a defendant to voluntarily choose among alternative courses of action, when one choice necessarily precludes another option, is not tantamount to compulsion. Absent a showing of improper compulsion, a person who chooses to make a statement without invoking his privilege against self-incrimination is deemed to have done so voluntarily, and there is no constitutional barrier to using that statement in a subsequent criminal proceeding. *Minnesota v. Murphy*, 465 U.S. 420, 440, *rehearing denied* 466 U.S. 945 (1984). Mr. Harvey was never presented with a "do this or else" choice. He was not told to waive his privilege, nor told that he would be punished more severely if he failed to make a statement. No statute or rule required more severe punishment if he failed to speak. The Petitioner

has made no showing that his sentencing process subjected him to improper pressures like those condemned in *Garrity v. New Jersey*, 385 U.S. 493 (1967).

The key to the Petitioner's argument is his presumption that the mere possibility of a disagreeable sentence *forced* him to speak in the hope that his statement would serve to mitigate his sentence. The purely subjective fear which the Petitioner now claims he felt about what might happen unless he incriminated himself at sentencing is simply not sufficient to bring him within *Garrity's* cloak of protection. *See United States v. Indorato*, 628 F.2d 711, 716 (1st Cir. 1980), *cert. denied* 449 U.S. 1016 (1980). There is nothing inherently repugnant to due process because he was given a choice. Choice does not equal compulsion. *State v. Horton*, 561 A.2d 488, 491 (Me. 1989). Volunteered statements, whether made in or outside of court, are not barred by the fifth amendment. *Miranda v. Arizona*, 384 U.S. 436, 478 (1966).

Despite the Petitioner's efforts to portray this case as involving new or unsettled points of constitutional law, it has been adequately resolved under well established legal principles which do not raise any substantial questions of federal law. Simply put, the Petitioner made admissions which were against his interest, and such admissions were properly received into evidence in a subsequent proceeding. Accordingly, this Court should decline to exercise certiorari jurisdiction in this matter.

CONCLUSION

Review by the United States Supreme Court is precluded by the Wyoming Supreme Court's reliance on state constitutional provisions which create adequate and independent grounds for its decision. In addition, the Petitioner has failed to show that the Wyoming Supreme Court erred in its application of well established law regarding the use of judicial admissions. There is no constitutional issue worthy of review by this court.

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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